

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of THOMAS P. MOONEY and DEPARTMENT OF THE NAVY,  
HUNTERS POINT NAVAL SHIPYARD, San Francisco, Calif.

*Docket No. 97-342; Submitted on the Record;  
Issued September 17, 1998*

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DECISION and ORDER

Before GEORGE E. RIVERS, DAVID S. GERSON,  
WILLIE T.C. THOMAS

The issue is whether the Office of Workers' Compensation met its burden of proof in rescinding its acceptance of appellant's claim for asbestosis.

On November 15, 1995 appellant, then an 84-year-old retired ship-fitter, filed a notice of occupational disease, claiming that his work exposure during 1950 to 1970 caused "asbestos contamination." Appellant retired in June 1974 when the employing establishment closed.

Appellant stated that his breathing had become increasingly difficult over the 20 years he had been retired and that he gave up cigarette smoking in 1963 after averaging a pack a day since 1950. Appellant explained that his work duties required the handling of asbestos 80 to 90 percent of the time because the interior ship bulkheads on which he worked were insulated with this material.

On May 6, 1996 the Office referred appellant, along with the medical records, a statement of accepted facts, and a list of questions, to Dr. Lawrence Shapiro, Board-certified in internal medicine, for a second opinion evaluation. Based on his June 24, 1996 report, the Office accepted appellant's claim for bilateral asbestosis on July 2, 1996 and asked him to submit the necessary forms for a schedule award.

Subsequently, appellant submitted a July 24, 1996 report from Dr. David Goya, an osteopathic practitioner who diagnosed asbestosis, as shown by chest x-ray, related to appellant's work exposure, and stated that while he could not comment on appellant's ability to work, his severe emphysema associated with asbestos exposure and shortness of breath would limit him.

On September 3, 1996 the Office rescinded its acceptance of the claim based on the report of its medical consultant, Dr. Charles C. McDonald, Board-certified in internal medicine, who stated that Dr. Shapiro had misdiagnosed asbestosis because there was no evidence of interstitial disease. The Office amended its acceptance to the condition of pleural plaques

secondary to asbestos exposure and found no disability causally related to this condition and zero percent respiratory impairment secondary to asbestos exposure.

The Board finds that the Office failed to meet its burden of proof in rescinding its acceptance of appellant's claim.

Under the Federal Employees' Compensation Act,<sup>1</sup> once the Office accepts a claim, it has the burden of proof in justifying termination or modification of compensation. The Board has noted that the power to annul an award of compensation is not arbitrary and that such an award can be set aside only in the manner provided by the compensation statute.<sup>2</sup> The burden of proof remains with the Office if it later decides that it erroneously accepted a claim.<sup>3</sup> To justify rescission of its acceptance of a claim, the Office must show that it based its decision on new evidence, legal argument and/or rationale.<sup>4</sup>

In this case, Dr. Shapiro examined appellant on June 3, 1996, noting his history of asbestos exposure and shortness of breath. Dr. Shapiro found a mildly kyphotic chest, scattered wheezes, a few basilar inspiratory crackles and cyanotic toes. Appellant's chest x-ray and a computerized tomography (CT) scan showed bilateral pleural plaques but no evidence of interstitial disease. Pulmonary function studies showed a moderately severe restrictive defect, as evidenced by a decreased forced vital capacity and an abnormal diffusing capacity, and a moderately severe obstructive defect, as evidenced by the reduced flow rates and increased residual volume or air trapping.

In response to the Office's questions, Dr. Shapiro diagnosed asbestos-related disease, based on appellant's exposure history, the x-ray findings of pleural plaques, and the restrictive defect shown by the pulmonary function studies. Dr. Shapiro added that appellant's pleural-based disease clearly indicated asbestosis, which, as shown by the CT scan and the absence of interstitial disease, was only minimal at this point. The physician explained that there was no specific treatment for the asbestos-related disease, that appellant was "significantly disabled" and continued to suffer from residuals of the work-related condition, and that permanent functional loss appeared to be about 50 percent, based on the current pulmonary function studies findings, which were permanent and stationary.

Dr. McDonald reviewed the medical records, including Dr. Shapiro's report, and disagreed with his diagnosis and finding of restrictive defect on the June 13, 1996 pulmonary function studies. Dr. McDonald stated that Dr. Shapiro was "confusing" the terms, that the diagnosis of asbestosis was not applied to pleural plaques but was "reserved" for individuals who had interstitial fibrosis caused by asbestos exposure. Dr. McDonald added that pleural plaques did not cause restrictive physiology and that the "correct nomenclature" was pleural plaques due to asbestos exposure without evidence of impairment.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193 (1974).

<sup>2</sup> *Lorna R. Strong*, 45 ECAB 470, 480 (1994).

<sup>3</sup> *Martha L. Cook*, 47 ECAB \_\_\_\_ (Docket No. 95-429, issued December 6, 1995).

<sup>4</sup> See *Laura H. Hoexter* (Nicholas P. Hoexter), 44 ECAB 987 (1993); *Alphonso Walker*, 42 ECAB 129 (1990), *petition for recon. denied*, 42 ECAB 659 (1991); *Roseanna Brennen*, 41 ECAB 92 (1989), *petition for recon. denied*, 41 ECAB 371 (1990).

Dr. McDonald concluded that appellant's pleural plaques were caused by his employment, that appellant had severe airways obstruction caused by cigarette smoking, that he was not disabled because of his asbestos-related disease, and that he had zero percent impairment from asbestos-related disease.

While Dr. McDonald agreed with Dr. Goya that appellant's pulmonary function studies showed only an obstructive defect, Dr. Shapiro found a restrictive defect based on the reduced slow and forced vital capacity results and an abnormal diffusing capacity. Dr. McDonald does not address this rationale in concluding that appellant had only an obstructive defect and therefore no impairment due to asbestos-related disease.<sup>5</sup>

Both physicians are Board-certified in their specialties. Both physicians reviewed the pertinent history and medical records and reached conflicting conclusions based on their expertise. Dr. Shapiro had the added advantage of actually examining appellant. While Dr. McDonald provided rationale for disagreeing with Dr. Shapiro's diagnosis, he offered no explanation for his conclusion that appellant had no respiratory impairment.

The Board finds no reason to accord more probative weight to Dr. McDonald's opinion over that of Dr. Shapiro. Therefore, the Board finds that the Office has failed to meet its burden of proof in rescinding its acceptance of appellant's claim for asbestosis related to his employment.

The September 3, 1996 decision of the Office of Workers' Compensation is reversed.

Dated, Washington, D.C.  
September 17, 1998

George E. Rivers  
Member

David S. Gerson  
Member

Willie T.C. Thomas  
Alternate Member

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<sup>5</sup> See *Rudy C. Sixta, Jr.*, 44 ECAB 727, 731 (1994) (finding that the medical evidence upon which the Office relied to rescind an award of compensation failed to address a relevant question).